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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOAN BETTS DIPLARAKOS,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court violated petitioner's Sixth Amendment rights by dismissing a juror without good cause after jury deliberations had begun and the jury had twice reported itself deadlocked.

2. Whether the court's examination of jurors after deliberations had begun violated petitioner's Sixth Amendment rights.

3. Whether failure to declare a mistrial under the particular circumstances violated petitioner's Sixth Amendment rights.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

JOAN BETTS DIPLARAKOS,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Joan Betts Diplarakos, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeal of California, Second Appellate District, Division One, affirming her conviction for theft and sentence of ten years imprisonment.

JUDGMENT AND OPINION BELOW

The order of the Court of Appeal of California, Second District, Division One, No. B034153 (not to be published), is set out as Appendix A.

JURISDICTIONAL STATEMENT

On September 28, 1989, the Court of Appeal of California, Second Appellate District, Division One, filed its opinion and order affirming conviction. (App. A) Defendant's timely Petition for Review to the Supreme Court of California was denied on January 4, 1990. (App. B)

This petition to review the judgment of a state court of last resort is timely filed within ninety days after denial of Petition for Review.

Jurisdiction is invoked under 28 U.S.C. § 1257(a) and Rule 10 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

STATUTORY PROVISIONS INVOLVED

Section 1089, California Penal Code provides in pertinent part:

> "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform

his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

STATEMENT OF THE CASE

NATURE OF THE CASE

Petitioner was found guilty of eighteen counts of grand theft after a jury trial (Cal. Pen. Code, § 487, subd. (1) and § 12022.6, subd. (a) and (b)) and sentenced to an aggregate of ten years in prison. Her conviction and sentence were affirmed by the California Court of Appeal. (App. A) Her petition for review to the Supreme Court of California was denied, with Justice Mosk of the opinion that the petition should be reviewed. (App. B)

STATEMENT OF FACTS

Defendant's trial lasted approximately two months. On the fifth day of deliberations, the judge received two notes from the jury. The first stated that it was deadlocked and requested further instructions on how to proceed. (Tr. 2072) The judge responded by inquiring whether the jury had discussed the merits of each count. (Tr. 2073)

The second note stated, *inter alia*, "We are deadlocked regarding interpretation of the evidence. (11-1)." (Tr. 2073) The court responded that the jury should not consider itself deadlocked until it had considered the evidence as to all counts, offering further assistance if so desired. (Tr. 2074)

The court then received a note in which eleven of the jurors were critical of juror number 8, Ms. Carter, alleging, *inter alia*, that she had a closed mind and was not willing to consider the evidence objectively. (Tr. 2074) After discussion with counsel, the court reinstructed the jury on certain areas of law and procedure. (Tr. 2083)

The following day, the court received a note from Ms. Carter stating, "The jury feels that I am holding them up and that I should ask you to disqualify me as a juror. I feel that I am losing a battle to have my own opinion." (Tr. 2084) Defense counsel moved for a mistrial. (Tr. 2085)

Then, the court, *sua sponte*, raised the issue of possible juror misconduct by Ms. Carter. (Tr. 2086) Over objection, the court interviewed Ms. Carter, who responded that she was being conscientious, was following the law and was complying with and understood all instructions. (Tr. 2099-2103) Over further objection, the court instructed the entire jury to continue deliberating. (Tr. 2111-12)

The following day, the court received separate notes from two jurors complaining of the manner in which Ms. Carter was deliberating. (Tr. 2117, 2123-24) The court examined the two jurors and then reexamined Ms. Carter. (Tr. 2117-45) Her answers were consistent with proper conduct as a juror. (Tr. 2140-45)

The court then interviewed two more jurors. (Tr. 2155-64) Questions of all five jurors delved into the

jurors' reactions to hypothetical questions discussed during deliberations and other matters relating to state of mind and evaluation of instructions and evidence.

At the end of this examination, the trial judge invoked § 1089, California Penal Code, to find that Ms. Carter was "subject to misconduct in her failure to follow the law and instructions of the court in her deliberations." (Tr. 2168) Over objection, she was replaced by another juror. (Tr. 2171) The jury was further instructed. (Tr. 2171-72) A conviction on all counts followed. (Tr. 2184-95)

RAISING THE FEDERAL QUESTION BELOW

At all times below, before the California Court of Appeal and the Supreme Court of California, Petitioner challenged the prejudice to her constitutional rights under the Sixth Amendment to impartial jury deliberations. (U.S. Constitution, amend. VI)

I.

THE COURT VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO JURY TRIAL BY DISMISSING A JUROR WITHOUT GOOD CAUSE AFTER JURY DELIBERATIONS HAD BEGUN AND THE JURY HAD REPORTED ITSELF DEADLOCKED.

A state defendant has a Sixth Amendment right to be tried by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 49 (1968).

Dismissal of a juror without good cause during deliberations denies a defendant the right to a unanimous jury verdict, a right protected by the Sixth Amendment. *United States v. Essex*, 734 F.2d 832, 840 (D.C. Cir. 1984). Without unanimity there can be no verdict supported by proof beyond a reasonable doubt. *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953).

In *United States v. Brown*, 823 F.2d 591, 594 (D.C. Cir. 1987), the court reversed a conviction where a juror was removed during deliberations based on his reservations regarding the sufficiency of the evidence. The court stated at page 596:

> ". . . we must hold that if the record evidence disclosed any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request."

Pointing out that discharge under those conditions would be "unacceptable under the Constitution," because the right to a unamimous verdict would then be illusory, the court reasoned that the trial judge must either declare a mistrial or send the juror back to deliberate with instructions to continue to attempt to reach agreement. The court reasoned that there may be instances in which the reasons for dismissal may often be unclear. But, ". . . a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations." 283 F.2d at 596.

In the instant case, the court's interrogation of the jurors complaining about Ms. Carter, showed that one juror complained that Ms. Carter did not believe any of the state's witnesses, but did believe the defendant, who had testified. (Tr. 2118) That same juror stated that

Ms. Carter seemed convinced by what defense counsel said in closing argument. (Tr. 2121)

The next juror interviewed complained of the same thing: "Juror No. 8 has chosen not to believe the testimony of any witness except the defendant." (Tr. 2124) Similarly, that juror complained that Ms. Carter's position was that ". . . the defendant had no intent to commit this crime." (Tr. 2128)

The court based its finding of misconduct on the juror's failure to follow the law, specifically, the instruction on restitution. (Tr. 2167) But the excused juror denied misinterpreting that instruction (Tr. 2141) and defense counsel showed that it was tied in with reorganization, an issue about which evidence was heard and about which there was an instruction. (Tr. 2166)

Jury deliberations are "a particularly sensitive stage of the trial." *United States v. Stratton*, 779 F.2d 820, 832 (2nd Cir. 1985). Although holding that the trial judge did not err in excusing a juror during deliberations for religious reasons, the court stated, in *Stratton*:

> "We note that the record does not present even the slightest basis to believe that Juror No. 10 was excused on a pretext to remove an obstacle to realizing a unanimous verdict."

In the instant case, the sole reason for dismissal of the juror was to change, by manipulation, the make up of the jury in order to remove an obstacle to a unanimous verdict.

What occurred in this case was the misuse and abuse of a statute which should be sparingly applied, and only for reasons not impinging on the proper function of a juror in the minority during deliberations. As such, it

was a violation of the Sixth Amendment right to trial of sufficient importance for review by this Court.

II.

THE COURT'S EXAMINATION OF JURORS AFTER DELIBERATIONS HAD BEGUN VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHTS.

"A juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide. . . . But a juror generally cannot testify about the mental process by which the verdict was arrived." *Rushen v. Spain*, 464 U.S. 109, 122, n.5, 104 S.Ct. 453, 457 (1983) (citations omitted).

Questioning of jurors during a trial carries the risk that the questioning itself will prejudice one of the parties. *United States v. Shapiro*, 669 F.2d 593, 603 (9th Cir. 1982). This Court has long held that there are numerable excellent reasons for not allowing jurors to impeach their verdicts by giving testimony evincing evidence of misconduct during deliberations. *McDonald v. Pless*, 238 U.S. 264, 267, 35 S.Ct. 783, 784, 50 L.Ed 1300 (1915). *See also, Castaldi v. United States*, 251 F.Supp. 681, 683 (E.D. Mo. 1966)

In this case, the trial judge interrogated four jurors regarding the lone dissenter's views, not only on jury instructions (Tr. 2127-29, 2157-63), but also about her responses to a homey hypothetical question created by the jurors to determine whether the defendant's actions constituted theft. (Tr. 2126, 2159) Among the areas canvassed during this "trial within a trial" were the concept of theft (Tr. 2126), whether written evidence was entitled to the same weight as oral testimony

(Tr. 2127), negligence as a defense (Tr. 2129), and poor business practices as a defense. (Tr. 2128)

The dissenting juror's answers to all the court's questions indicated she was a serious juror who understood and was applying the law and simply was not convinced regarding defendant's guilt at that juncture. (Tr. 2142-45) After the interrogation, no one could expect any one of the four jurors who had been exposed to the judge's interrogation to change his or her mind or to continue jury deliberations in the proper frame of mind.

If his questions left no doubt that he agreed with the four jurors on defendant's guilt, the trial judge's action in disqualifying the juror who did have doubts must surely have impressed those four jurors with the correctness of their position. Therefore, further deliberations could not possibly continue with those four jurors having an open mind. "If a single juror is improperly influenced, the verdict is as unfair as if all were." *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940).

In *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946), this Court stated:

> " 'The influence of the trial judge on the jury is necessarily and properly of great weight,' . . . and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (citations omitted).

The judge's examination of the jurors during deliberations intruded into their privacy in a manner not permitted even after a verdict has been reached. It modified and manipulated the deliberations in an impermissible manner and prejudiced petitioner beyond repair.

III.

BY NOT DECLARING A MISTRIAL UNDER THE PARTICULAR CIRCUMSTANCES, THE COURT VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHTS.

As an abstract proposition of law, it is true that a defendant has no right, constitutional or otherwise, to a hung jury. "He has only the right to have the jury speak without being coerced." *United States v. Sawyers*, 423 F.2d 1335, 1341 (4th Cir. 1970).

However, if the court improperly decides to dismiss a juror during deliberations, the only constitutional alternative is a mistrial. In other words, there are circumstances when the *only* proper action is a mistrial and juror substitution, although statutorily permissible, is an abuse of discretion.

In *Henderson v. Lane*, 613 F.2d 175, 178 (7th Cir. 1980), the court said, ". . . the substitution procedure might raise constitutional problems by 'significantly limit[ing] the accused's right to a mistrial if the original jury cannot reach agreement.' 529 F.2d 1156." The court in *Henderson* was quoting from the opinion in *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), in which the court stated, "The inherent coercive effect upon an alternate juror who joins a jury that has, as in this case, already agreed that the accused is guilty is substantial." *Id.* at 1156.

Although not strictly analogous on the facts, the court's reasoning in *Lamb* applies in this case:

> "Moreover, such a procedure significantly limits the accused's right to a mistrial if the original jury cannot reach agreement. A lone juror who could not in good conscience vote for conviction could be under great pressure to feign illness or other incapacity so as to place the burden of decision on an alternate juror." *Id.* at 1156.

In the instant case, the court had already been informed twice that the jury was deadlocked. (Tr. 2072-73) The court had also been told that eleven jurors were asking to remove the twelfth juror in the interest of unanimity and the twelfth juror said she was "losing a battle to have my own opinion." (Tr. 2084)

Under those circumstances, prudence and respect for the place of unanimity in jury verdicts dictated that the judge either declare a mistrial or ask the jury to continue deliberations for a reasonable time. Instead, the court, *sua sponte*, raised the issue of misconduct and launched a "trial within a trial." His clear but unstated purpose was to manipulate the statute to achieve a guilty verdict.

CONCLUSION

There is no case law directly on point, nor even closely related, regarding the manner in which the dissenting juror in the instant case was treated. This is so, most likely, because the bounds of judicial restraint have rarely been exceeded so egregiously. If the Sixth Amendment is to retain its validity, it is this Court which must act. For these reasons petitioner respectfully requests that this petition be granted.

Respectfully submitted,

ALLAN H. STOKKE

Attorney for Petitioner
Joan Betts Diplarakos

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

COURT OF APPEAL
SECOND DIST.
FILED
SEP 28 1989
Robert N. Wilson Clerk

Deputy Clerk

THE PEOPLE,
Plaintiff and Respondent,
v.
JOAN BETTS DIPLARAKOS,
Defendant and Appellant.

B034153
(Super. Ct. No. A861362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed.

Peter L. Recchia & Associates and Peter L. Recchia for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Arnold Overoye, Acting Chief Assistant Attorney General, Edward T. Fogel, Jr., Senior Assistant Attorney General, Donald D. de Nicola, Supervising Deputy Attorney General, Tricia Ann Bigelow, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Joan Betts Diplarakos appeals from a judgment of conviction entered after a jury trial. Defendant was convicted on eighteen counts of grand theft (Pen. Code, § 487, subd. (1)). The jury found true the allegations the crimes charged in counts IV, VIII-XIII, XV, and XVII-XIX involved the theft of funds and property valued in excess of $25,000 (Pen. Code, § 12022.6, subd. (a)). The jury also found true the allegation the crime charged in count VII involved the theft of funds and property valued in excess of $100,000 (Pen. Code, §§ 12022.6, subd. (b), 1203.045). Defendant was sentenced to state prison for the term prescribed by law.

STATEMENT OF FACTS[1]

Trial in this case lasted approximately two months. On the fifth day of deliberations, the jury foreman, Karen Carter, sent the trial court a question: " 'We cannot come to a decision on the projects we have discussed. We are deadlocked. We need some instructions on how you want these verdicts under these conditions.' " The trial court responded: " 'Would you please tell me if during your deliberations thus far, you have discussed the merits of each count charged?' " They replied: " 'We are deadlocked regarding interpretation of the evidence. (11-1)' " The trial court

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[1] Defendant does not challenge the sufficiency of the evidence to support her conviction or set forth in her statement of facts any information regarding the crimes of which she was convicted. She challenges only certain events which occurred during jury deliberations and cites to the record only with respect to these events. Accordingly, our statement of facts sets forth only these events.

wrote back that the jury should not consider themselves to be deadlocked until they had considered the evidence as to all counts and, if the court could be of any further assistance regarding the law, procedures for deliberation or anything else, they should submit additional written questions.

The jury then submitted a question which read: " 'One juror feels that intent to defraud cannot be proven because the defendant had asked and filed for reorganization rather than bankruptcy. Eleven jurors feel that whether or not the defendant had assets or filed for reorganization rather than bankruptcy is not relevant. It is not the issue. Eleven jurors feel that one juror has a closed mind and is not willing to consider the evidence objectively.' " Where the foreman was supposed to sign, it read: " 'Note prepared by eleven jurors' "; below that, it was signed by Ms. Carter as foreman.

The court then discussed with counsel how to respond, suggesting it might reread certain instructions. Defendant's counsel was concerned that, now the court was informed the jury stood eleven to one, reinstruction might be interpreted as telling the holdout juror he or she was making a mistake and puting pressure on him or her to agree with the majority. He also did not believe they could look into the jury's reasoning process. He requested if the jury was reinstructed, an additional instruction be given that every juror has a right to his or her own opinion; jurors should be openminded, but if a juror is voting his or her conscience and believes he or she is following the law, he or she does not have to change position just because eleven other jurors want him or her to do so.

The prosecutor agreed they could not look at the jury's reasoning process but interpreted the jury's question as asking for legal guidance, calling for rereading instructions or giving additional instructions. He

objected to the additional instruction proposed by the defense but had no objection to a rereading of CALJIC No. 17.40, which was to the same effect. After some discussion, the trial court decided to reinstruct the jury regarding certain areas of law and procedure.

The following day, the trial court indicated it had received a note from the foreman, Ms. Carter, which read: "The jury feels that I am holding them up and that I should ask you to disqualify me as a juror. I feel that I am losing a battle to have my own opinion." Defense counsel then asked the court to declare a mistrial. The prosecutor thought further information should be obtained before a mistrial was declared, such as whether the jury had discussed all the merits of all the counts and whether they were all willing to continue deliberating.

The court was of the view "there is a possible allegation of juror misconduct by the other jurors in that there was some question at the prior questions that one juror was not following procedures." The court wanted to question Ms. Carter and ask her to elaborate on her point of view, and see whether she was willing to deliberate openmindedly on each count, but acknowledged it was a touchy situation and the court did not want to pressure her. Defense counsel did not believe such questioning would be proper, but the trial court decided to question Ms. Carter.

In chambers, the court assured Ms. Carter it was "not in any way attempting to pressure [her] as to what [her] decision should be in the case, but [it was] merely trying to find out what the meaning of [her note was]." She said one of the jurors in particular felt she should disqualify herself because she said she needed time to look into the records to satisfy herself. She was the only one who looked into the box of evidence in the jury room. The others had made up their minds and felt that she should have made up her mind and was wasting the

taxpayers' money. The court asked her whether she had discussed with the other jurors the merits of all the counts. She said they had not gone through every one; whenever she requested they go through one they would say there was no use, she had a closed mind. She would tell them she had not made up her mind; she had not looked at the evidence.

The trial court reread for Ms. Carter CALJIC No. 17.40, which instructs the jurors to decide the case for themselves after discussing the evidence and instructions with the other jurors, and tells them they should not hesitate to change an erroneous opinion if they become convinced it is erroneous but they should not decide any question in a particular way because a majority of the jurors favor such a decision. It asked her whether she felt she could comply with the instruction and she responded that she could. She was then excused. After the court discussed the situation with counsel, the jury was brought back into the courtroom and the court instructed them to resume their deliberations.

The following day, the trial court received several questions or statements from other individual jurors. Ruthie Williams wrote: "I'm very uncomfortable at this point of what I am seeing. I would be remiss if I didn't say it. I make no apology, but I ask to be heard." She was brought into the courtroom and the court asked her to explain. She said she was upset and further deliberations were useless — Ms. Carter was biased and her mind was made up when she walked into the door to the jury room. Ms. Carter was avoiding the evidence and saying all the witnesses but defendant were lying. The other jurors would read the law to Ms. Carter and she would say "it doesn't mean that," and she would not pay attention to it.

To get an example of what was going on, the court read for Ms. Williams an instruction given to the jury

that "It is not a defense to a prosecution for theft that after the theft was committed, complete or partial restitution or offer of restitution was made to the owner of the stolen property or that his loss was wholly or partly recouped by any other means." Ms. Williams said that when they started talking about the evidence and the law, Ms. Carter would say: "Well, she went into reorganization." The other jurors would explain that the crime was committed before the reorganization, but Ms. Carter would ignore the evidence and talk about the reorganization. The other jurors would read the foregoing instruction to her and Ms. Carter would say that was not what it meant, they could not go by that.

Juror Susanna R. Des Jardien wrote: " 'Does juror no. 8 [Ms. Carter] have the right to systematically disregard the entire prosecution evidence and the law? For example, juror no. 8 dismissed Mr. Young's testimony about Dr. Ramos's $28,000 being deposited and spent mostly on projects other than Diamond Bar. We showed juror no. 8 the business ledgers, but she said, "I don't believe it." Juror no. 8 has chosen not to believe the testimony of any witness except defendant.

" 'Juror no. 8 argued that written evidence carries more weight than oral evidence. We showed her the law. She continued to insist she was right.

" 'Juror no. 8 argued that the "fact" that the defendant planned to make restitution to the victims proved that she had no criminal intent. We showed her the law. She said, "I don't agree with it."

" 'We asked juror no. 8 to substantiate her opinions. She read to us a subscription agreement and the written instructions the defendant gave her sales force. She claimed these documents proved her point.

" 'From the first day of deliberations it was clear that no matter what was said, no matter what the evidence,

no matter what the law says, juror no. 8 would not change her opinion.

" 'I ask the court if there is any recourse or must juror no. 8 be allowed to thwart the legal process by her refusal to live up to her oath?' "

The court called Mrs. Des Jardien into the courtroom after Ms. Williams had left. The court discussed her note with her and specific instances where Ms. Carter would refuse to follow or disagree with the law given in the jury instructions.

Mrs. Des Jardien was excused and Ms. Carter brought into the courtroom. The trial court asked her whether she had concluded written evidence was more believable than oral evidence; she replied they were equal. The court read her the instruction regarding restitution not being a defense to a prosecution for theft and asked her if the instruction had been referred to during deliberations. She said one juror had asked her if she understood it, but at the time the instruction was not relevant to what they were discussing. She explained the conversation regarded the idea "if someone was given property back, that does not make the fact of the crime go away." She said she agreed with that. The other juror felt the instruction had to do with reorganization, but Ms. Carter had no conclusion in that regard; she did not argue the instruction had nothing to do with reorganization. Ms. Carter also told the court she had not stated she did not concur with the instruction as being the law or she did not agree with it. The court also discussed with her an embezzlement instruction which Mrs. Des Jardien indicated Ms. Carter would not follow. Ms. Carter was then excused.

After some discussion with counsel, the trial court decided — with the concurrence of the prosecutor and over the objection of defense counsel — to question some of the other jurors to determine what was going on

in the jury room and whether Ms. Carter was refusing to follow the instructions or not. Juror Doris Castaneda was called into the courtroom and asked if she felt there was any juror who was not following the law during the deliberations; she named Ms. Carter. When asked to elaborate, she explained Ms. Carter was interpreting the instructions in a different manner than the other 11 jurors, specifically the instructions regarding restitution and intent to defraud. According to her, no one made a statement written evidence was inherently more believable than oral testimony.

Ms. Castaneda was then excused and juror Carol Hart was brought in. She was asked similar questions and gave similar answers. She also mentioned Ms. Carter kept bringing up the reorganization in connection with the restitution instruction and saying "that it was all right because [defendant] went into reorganization."

The trial court then discussed with counsel whether they felt there was a prima facie showing of misconduct. The prosecutor believed there was, that Ms. Carter was refusing to follow the law and lying to the court about it. Defense counsel disagreed on both points and felt it would be unfair to defendant to excuse Ms. Carter at that time. The trial court agreed with the prosecutor and ruled, pursuant to Penal Code sections 1089 and 1123, there was good cause to excuse Ms. Carter for failure to follow the instructions as to the law. She was then discharged from the jury.

CONTENTION

Defendant contends the trial court erroneously partook in the jury's deliberations rather than declaring a mistrial when informed of the 11 to 1 deadlock, violating her right to trial by jury. For the reasons set forth below, we disagree.

DISCUSSION

The principles on which defendant relies are stated in *People v. Baumgartner* (1958) 166 Cal.App.2d 103 (disapproved by *People v. Gainer* (1977) 19 Cal.3d 835): When the jury informs the trial court it has not agreed and there is doubt whether an agreement can be reached, it is proper to instruct the jury as to the advisability of reaching a verdict (166 Cal.App.2d at pp. 106-107). However, the instruction "must be carefully guarded lest the jury be persuaded the court desires a certain verdict to be brought in." (*Id.* at p. 107.) The propriety of the instruction depends upon the presence or absence of coercion. (*Ibid.*) Such coercion is much more likely to exist where the court is informed in the jury's presence of the numerical status of the jury with respect to conviction or acquittal. (*Ibid.*) It may appear the instruction is aimed at the holdout jurors and coerce those jurors to agree with the majority. (*Id.* at p. 108.)

For example, in *People v. Walker* (1949) 93 Cal.App.2d 818, the trial court brought the jury into the courtroom and questioned whether they had reached a verdict; they said they were unable to agree. The court asked how they stood numerically, and they responded they were 10 to 2 for conviction. When asked if there was a possibility of reaching a conclusion if they stayed out a little longer, two jurors said it was possible. (At pp. 820-821.) The trial court told them it did not want to put them to any more inconvenience than necessary but had a responsibility to the taxpayers and the public to avoid a hung jury and mistrial if possible, so it asked them to go back and deliberate further and see if they could reach an agreement, stating: "Talk it over fairly; I don't want anybody to do violence to his own judgment, *but at the same time there are twelve of you, — and ten*

one way and two the other — that is coming pretty close to an agreement." (*Id.* at p. 821, emphasis original.)

On appeal, the court noted it was prejudicial error for a judge who knows how the jury stands to make remarks "such as to bring to bear in some serious degree, although not measurable, an improper influence upon the jury, or to indicate to the jury that a particular result should be reached . . . ." (93 Cal.App.2d at p. 825.) In the case before it, the judge's remarks could have been taken by the two jurors voting for acquittal to mean that the judge felt they should vote with the majority. (*Ibid.*) The court added, "Undoubtedly, the judge did not intend to influence the jury as to the type of verdict to be rendered, but we must realistically consider the effect of the language used. There was no impropriety in his asking how the jury stood numerically, but the moment he gained the information concerning which way they stood, it was his duty to be more careful in his remarks thereafter, so that the jury would clearly understand that he was not urging, or even suggesting, a verdict one way or the other." (*Ibid.*)

Defendant contends once the trial court here learned the jury was deadlocked 11 to 1 — and could infer from the jury's question the 11 were in favor of conviction — and learned who the holdout juror was, its reinstruction of the jury and individual questioning of the holdout juror, Ms. Carter, had the effect of pressuring her to vote with the majority and convict defendant. Once it became clear Ms. Carter would not submit to the pressure and change her vote, a mistrial should have been declared. Further, the trial court erred in questioning her as to her thought processes, since "[i]t is not within the purview of the court to look at the thoug[h]t process used, or to exert pressure for what it believes the correct opinion is."

If all the court were trying to do was get a verdict from the jury, defendant's argument might have some merit. But, as the People point out, the court was also dealing with the possibility of juror misconduct, or the possibility the deadlock was due to the holdout juror's inability to do her duty and follow the instructions and oath given her (*People v. Boyde* (1988) 46 Cal.3d 212, 245, *cert. granted Boyde v. California* (1988) ___ U.S. ___ 104 L.Ed.2d 1002). This would authorize her discharge from the jury. (*People v. Burgener* (1986) 41 Cal.3d 505, 519.)

Penal Code section 1123 (repealed Stats. 1988, ch. 1245, § 42) provided in pertinent part: "If before the jury has returned its verdict into court, a juror becomes sick *or upon other good cause shown to the court is found to be unable to perform his [or her] duty, the court may order him [or her] to be discharged.*" (Emphasis added.) Penal Code section 1089 contains similar language. Both sections are discretionary. (*People v. Burgener, supra*, 41 Cal.3d at p. 519.)

Once a court is put on notice of the possibility a juror may be unable to perform his or her duty, the court has the obligation to make any inquiry reasonably necessary to determine whether the juror should be discharged. (*People v. Burgener, supra*, 41 Cal.3d at p. 520.) There is no statutory procedure for determining whether a juror is unable to perform his or her duty, but once a juror's competence is called into question a hearing on the facts is indicated. (*Id.* at p. 519.) The hearing may be a summary proceeding but should be complete enough to determine good cause. (*People v. Manriquez* (1976) 59 Cal.App.3d 426, 432.) Both the juror who may be discharged and the other jurors may be questioned. (See *id.* at pp. 429-430.) A court's determination as to good cause will be upheld on appeal if supported by substantial evidence (*Burgener, supra*, at p. 520), *i.e.*, where the

record shows an inability to perform the functions of a juror as a demonstrable reality (*People v. Collins* (1976) 17 Cal.3d 687, 696).

Cases hold good cause is shown when the record demonstrates a juror is unwilling or unable to decide a case based on the law or the evidence. For example, in *People v. Collins, supra*, a juror properly was discharged where she said she could not decide the case based on the evidence and the law since she was involved with it emotionally more than intellectually, and rereading the jury instructions would not help her. (17 Cal.3d at p. 696.) In *People v. Warren* (1986) 176 Cal.App.3d 324, a juror told the court she felt intimidated by the other jurors; she disagreed with them but thought she might vote the way they wanted her to, even if she believed she shouldn't, and she could not comply with the instructions she should not be influenced to vote in a particular way just because a majority of the jurors favor such a decision. (At p. 326.) It was held there was good cause to discharge her. (*Id.* at p. 327.)

It might be noted that a juror properly may be discharged even though he or she claims to be able to do his or her duty. (*See People v. Abbott* (1956) 47 Cal.2d 362, 371; *People v. Farris* (1977) 66 Cal.App.3d 376, 386.) The court may look to other evidence besides the juror's claims. (*Ibid.*)

Here, the trial court properly concluded Ms. Carter's competence was called into question and held a hearing on that subject, interviewing Ms. Carter and four of the other jurors. The jurors first indicated they were not only deadlocked, but the holdout juror was not considering the applicable law and was not willing to objectively consider the evidence. The trial court cautiously reinstructed them. The trial court later received a personal note from Ms. Carter — who identified herself as the holdout juror — expressing the concern that she was

losing a battle to maintain her own opinion. Aware of the possibility of misconduct, the trial court questioned her individually. It assured her it was not attempting to pressure her into any particular decision but wanted an explanation for her note. After she indicated she was willing to continue deliberations with an open mind, the court again instructed her, she agreed to follow the instruction and she was sent back to continue deliberations.

However, the court then received personal notes from two other jurors who indicated Ms. Carter was ignoring the evidence and refusing to follow the law. At this point, her competence definitely was called into question and the trial court properly interviewed those two jurors, Ms. Carter, and two additional jurors to determine whether Ms. Carter was unwilling or unable to perform her duty as a juror to decide the case based on the law and the evidence.

Moreover, there is substantial evidence to support the trial court's finding Ms. Carter was failing to follow the law and properly consider the evidence, her claims to the contrary notwithstanding. All four other jurors questioned indicated this was the case — Ms. Carter refused to believe any witnesses but defendant, she said written evidence should be given greater weight than oral evidence, she considered the fact defendant went into reorganization and planned to make restitution negated criminal intent, contrary to the jury instruction on restitution, which she disagreed with an refused to follow, among others. Accordingly, the trial court properly discharged her from the jury on the ground she was unable to perform her duty, and the trial court did not improperly take part in the jury's deliberations, requiring a mistrial, as defendant contends.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

HANSON (L. Thaxton), J.

ORTEGA, J.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division One, No. B034153
S012775
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
JAN 4- 1990
Robert Wandruff Clerk
Deputy

THE PEOPLE, Respondent

v.

JOAN BETTS DIPLARAKOS, Appellant

Appellant's petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice